

DATE ISSUED: MARCH 11, 1996

CASE NO: 95-WPC-1

In the Matter of:

RAY MASEK
Complainant

v.

THE CADLE COMPANY
Respondent

APPEARANCES:

James Franks, Esq.
Raymond J. Masek, Esq.
For the Complainant

John M. Manos, Esq.
For the Respondent

BEFORE: MICHAEL P. LESNIAK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON LIABILITY ONLY

This is a proceeding brought under the Water Pollution Control Act, 33 U.S.C. 1367; Clean Air Act, 42 U.S.C. 7622; the Toxic Substance Control Act, 15 U.S.C. 2622, and the regulations promulgated thereunder at 29 C.F.R. Part 24. The Secretary of Labor has been given responsibility pursuant to said statutes to investigate complaints by employees, or persons acting on their behalf, of discrimination action by employers.

The findings and conclusions which follow are based upon a complete review of the entire record, applicable statutory provisions, regulations, and pertinent precedent.¹ Having fully considered the evidence and arguments presented, I find as follows:

¹ The following citations to the record are used herein:
TR - Transcript of the hearing held in Warren, Ohio, June 20-21, 1995; CX - Complainant Exhibit, and RX - Respondent Exhibit.

Procedural History and Stipulations

On or about September 21, 1994, Complainant, *pro se*, filed a Complaint against the Cadle Company, alleging wrongful discharge for bringing certain matters to the attention of federal authorities. The parties stipulated that Complainant performed services for the Cadle Company as a temporary employee through the agency, CENCOR, from January 1994 through April 1994. He became an employee of the Cadle Company on May 1, 1994, and he was terminated August 26, 1994. (TR 6, 7) The Wage and Hour Division of the U.S. Department of Labor conducted a fact finding investigation and after an adverse ruling on November 30, 1994, the Cadle Company appealed and asked for a *de novo* hearing. (TR 7) The Cadle Company agrees that they are subject to the jurisdiction of the various Acts mentioned in the Complaint. (TR 8)

On June 9, 1995, I Ordered that trial would be bifurcated as to the issues of liability and damages. The liability portion of the trial was to commence June 20, 1995. Therefore, this Recommended Decision and Order will deal with liability only.

SUMMARY OF THE TESTIMONY
AND OTHER EVIDENCE AT TRIAL

Testimony of Raymond John Masek

He resides at 675 Mahoning Avenue, Apartment 2, Warren, Ohio, and was formally employed by the Cadle Company which is located in Newton Falls, Trumbull County, Ohio. He was initially employed with the Cadle Company through a temporary service placement agency from on or about January of 1994 through on or about May 1, 1994. (TR 14, 15) Masek is licensed to practice law in the State of Ohio. His initial job with the Cadle Company was an Account Officer to make collections. He would review files, contact debtors, and arrange payment plans. Masek was told that he was doing well and after about the first week, he was given the responsibility for the real estate owned properties (REO properties). The Company foreclosed on these properties and then tried to sell them. Masek was still working through the temporary service agency when he was given these new accounts. There were no formal guidelines on how Masek was to handle these accounts. It was a matter of reviewing each of the files and determining what needed to be done and then doing it with the approval of one of the two people who were authorized to give that approval. Masek had no authority on his own. (TR 20) However, Masek's recommendations regarding various REO accounts were accepted by the members of the Cadle Company. (TR 21) At no time during his initial employment did anyone from the Cadle Company indicate to Mr. Masek that they had a problem with what he was doing with the REO accounts. (TR 23)

One of the REO properties was located on Jennings Road in Cleveland, Ohio. Initially he was told to check if the insurance maintained by the former tenant would cover EPA problems that were being experienced. Masek was still under the services of the temporary service agency when he was given responsibility for the property on Jennings Road. This was early February of 1994. During his initial file review, he found some problems. The contractor reports, in particular, Vadose Research, regarding combustibility represented a safety hazard to workers and passersby; reported oil seepage by the President of Vadose Research, Bill Ullom, who personally stated that he saw the seepage from the property in the Cuyahoga River; buried landfill problems that were alluded to, industrial waste that had been buried. There was a risk analysis for air, surface water, combustibility, and legal risk, and everything was rated high. (TR 25) Everything was available in the case file. The documentation was from 1991 and nothing happened after that. There were notes of meetings with the Cleveland Fire Department officials which indicated that the company had to take action soon because an extension that was given until 1993 was about to expire. (TR 26)

On or about May 1, 1994, Masek began working directly for the Cadle Company. There was no formal contract just a statement by Bill Shaulis that he would be making over \$30,000.00 per year. (TR 27, 28) As far as Masek knew, there were no problems with Masek's competency during the time that he worked through the temporary employment agency.

After starting to work directly for the Cadle Company, Masek began working with attorneys and contractors to decide on a cost-effective way to remove the buried tanks as required by the City of Cleveland Fire Prevention Bureau. (TR 29)

Exhibit G is a log record maintained for the property at 4041 Jennings Road. The date of the first entry is February 1, 1994 and the date of the last entry is August 22, 1994. The last entry is a summary of a call from Daniel Cadle. He inquired who sent the Fire Marshall the letter from Vadose and was told that Masek did. Cadle threatened to fire Masek. Told Masek not to send that letter. (TR 32) Masek had difficulties in achieving action to abate the problems on the Jennings Road property. The bid proposals were consistently refused by Daniel Cadle. Masek would receive no support. The officials with Cadle would refuse out-of-hand without reason to support him. He was told to contact a gentlemen named Bruce Pollack (phonetic) who had some knowledge of a technology where microbes would eat contaminated soil. But his phone was disconnected. Masek kept getting reports of problems with combustibility, safety to the general public, possible oil seepage, possible contaminated drums, and industrial waste on the site. Masek kept reporting the problems to Mr. Cadle and the reaction was that it was not a problem.

Masek identified Exhibit C-3 as an attachment for Mr. Ullom about his research which went with the memorandum which Masek distributed to his supervisor, Denise Harkless, to Mr. Buente, to Mr. Shaulis, and to Mr. Cadle. The attachment indicates that there were problems. Masek received no response. It was considered a non-problem. There were jokes made about it.

After Masek decided that the Company was not going to abate the problems, Masek sent a fax to Inspector Ollie Zahorodnij with the Cleveland Fire Prevention Bureau and he put on the cover sheet, RE: Possible Safety Hazard. (see Exhibit C-4; TR 35, 36)

When Masek was not getting a response from the Cadle Company he initially contacted U.S. Attorney Gregory Sassay about the problems. Masek knew that he was very active in environmental matters. (TR 37) After Masek's conversation with the U.S. Attorney, Masek contacted Investigator David Barlow of the U.S. Environmental Protection Agency, Criminal Investigative Service. Masek did not tell his employer what he was doing regarding these contacts. (TR 38)

Masek explained to Mr. Cadle the seriousness of the problems at the Jennings Road property over and over and nothing was ever done. (TR 40) There came a time when Cadle was found guilty for his failure to remove underground storage tanks and he was fined. (TR 43)

Prior to August 22nd, Masek had no type of written reprimand that indicated that his employment with the Cadle Company was unsatisfactory. No individual from the Cadle Company ever told him that he was doing a bad job. (TR 44) Masek was doing everything that he was suppose to be doing with the exception of the Jennings Property. With regards to the call from Mr. Cadle, this occurred on August 22. He called him on the telephone which was unique. (TR 44) After this call, Masek felt that he had reason to believe he would be terminated. On August 26, 1994, at 11:00 or 11:30 a.m. he was called into Bill Shaulis' office. Denise Harkless, Masek's supervisor, was there. Bill Shaulis just said that things were not working out and that he was being terminated. The termination was effective immediately. They wanted Masek out on the spot. (TR 45) He was followed to his work site and watched while he was cleaning out his drawer. Masek was shaken. He went home and called Inspector Zahorodnij and told him that he was fired. Thereafter at some point, he contacted the U.S. Department of Labor.

Mr. Masek testified on cross-examination that he had no knowledge of whether he was hired because he had a legal background. (TR 54) Masek denied refusing to prepare a lease on March 15, or do any legal work because he was not being paid as a lawyer. Masek explained that there was an incident where it was

requested that he put his name down as Corporate Counsel and he refused because they had their own in-house counsel. Masek did not recall telling Miss Harkless that he would not become involved with EPA decisions on REO's because he was fearful of personal liability. The Cadle Company acquired non-performing loans and it was Masek's job initially to go out and collect the money. It was incorrect to say that he did not feel like doing that or he refused to stay late to make phone calls. (TR 62, 63) He was suppose to stay late Monday nights and until 8:00 p.m. on Wednesdays. Masek did not recall telling Denise Harkless that he was too busy handling REO's to do collection work. He did not mind staying late. (TR 63) There was no standing instruction to Mr. Masek from Mr. Cadle concerning the tanks on Jennings Road. The only instruction Masek could recall was to check the insurance. (TR 72) Masek was never told to get a fixed price on the removal of the tanks. As far as being given names of contractors by Masek's supervisors, he was told to go out and check the local gas station and to contact BP in Cleveland to see how they got rid of tanks and that is all Masek recalled. Masek did not solicit a proposal from Cardamone Construction. (TR 73) Masek never saw a letter from Cardamone directed to him. (TR 74) Masek testified that he could get a price for the removal of the tanks from contractors but they would not set a cap because they did not know what other problems they might run into, for example, contaminated soil. This was always a problem for Mr. Cadle. (TR 77) Money was always an issue to Mr. Cadle regarding the removal of the tanks. (TR 78)

On June 21st, Masek sent a copy of the Vadose Report (regarding the tanks on Jennings Road) to Inspector Zahorodnij. Masek sent it to him the same day that he gave it to his supervisor and consulted with management. (TR 81) It was Masek's job to get the tanks out of the ground, but every time one of the fixed prices would be taken to Daniel Cadle, he would say that he did not want to hear about it, "go talk to the bug guy in California". (TR 84) The tanks were suppose to be out by March 31, 1994, pursuant to an Order issued to Dan Cadle. (TR 85)

Masek testified that he was not confronted about unauthorized use of the computer prior to his termination. (TR 93) Masek recalled being confronted concerning his name appearing on a list of credit checks that had run on the Cadle Company's computer. (TR 94) Masek denied that he ran a credit check on himself. He was fired shortly thereafter. (TR 96)

On redirect, Masek testified that he did not perform unauthorized use of credit checks while under Cadle employment. (TR 111) When Masek interviewed for the job with Cadle and gave his resume, Masek could not recall whether there were questions about law suits which he may have had against prior employers. However, he did indicate to Bill Shaulis the Vice President and Office Manager that there were prior law suits. On August 26,

1994, the reason he was given for his firing was that things didn't work out with regards to his handling of REO's. No indication was given whatsoever about alleged misconceptions of his resume and no indication was given regarding unauthorized use of credit checks. (TR 112)

Testimony of Lieutenant Ollie Zahorodnij

Lieutenant Zahorodnij's videotaped deposition was taken June 12, 1995, and he testified as follows:

Lieutenant Zahorodnij is an officer with the Cleveland Fire Department with the Hazardous Materials Unit. He has been so employed for eight or nine years. Lieutenant Zahorodnij's responsibilities include underground storage tank regulations, the Ohio Fire Code, and other standards connected to the Ohio Basic Building Code as it applies to the Fire Code. There is a permitted process in order to install and remove underground tanks. These permits are issued by the Fire Department. Exhibit 2 is a letter of violation that he wrote on December 15, 1992, concerning the abandonment of underground storage tanks. This was the first violation letter that he wrote regarding the subject tanks. He learned about the tanks at 4041 Jennings Road based upon a complaint that he had received and he acted on the complaint. Lieutenant Zahorodnij personally inspected the property at 4041 Jennings Road and he talked to individuals at St. Johnsbury Trucking and they told him they were not using the tanks and they were not exactly sure what was inside or how much. So Lieutenant Zahorodnij considered them to be abandoned. He took no steps to determine what was in the tanks.

Lieutenant Zahorodnij received Exhibit 3 which is dated January 11, 1993. Captain Root gave him a copy. This was a letter requesting additional time to remove the tanks or put them back in service. The letter indicates that the tanks are empty. However, the letter was coming from a person who did not have expertise in the underground storage tank area. There was not enough information in the letter.

Lieutenant Zahorodnij responded to the letter by saying that the tanks were not just temporarily out of use and by definition, were abandoned, and Lieutenant Zahorodnij requested that they be removed. Lieutenant Zahorodnij asked for action as soon as possible, however, there was an appeal with the Board of Building Standards and Appeals which was granted. The Board granted the Appellant twelve months in which to remove the tanks from the property. The tanks now had to be removed by March 31, 1994. Lieutenant Zahorodnij did not recall whether evidence was presented that the tanks did not pose an environmental threat. Sometime after March 31, 1994, there were some conversations with individuals with the Cadle Company. Lieutenant Zahorodnij did not remember who he talked to but they said that they were going

to have the tanks removed. After the one year extension, Lieutenant Zahorodnij was having problems getting someone to respond and that is why he wrote the violation letter or the request for the hearing. Lieutenant Zahorodnij issued a citation and the issue was whether the tanks had been removed. It is not just removing the tanks, it involved proper soil remediation, ground water remediation, etc. There was a concern about a gas well being on the property and safety of the workmen that would be doing the excavation and the possibility that there may have been buried waste or those types of hazards based on the fact that it was an industrial site. So it was more than just removing tanks.

Lieutenant Zahorodnij identified Exhibit 8. It is a report that he wrote on August 2, 1994. The tanks mentioned in the Violation Letter had not been removed and a court date was set for August 10, 1994. It says that Mr. Masek of the Cadle Company submitted a bid for removal. It indicates that Vadose Research did soil gas samplings for potential organic compounds and that a gas well was located south of the tank location. The bid for removal was from John Cardamone, a contractor. Lieutenant Zahorodnij knew from this information that somebody at the Cadle Company had signed the contract to have the tanks removed but this was not sufficient to avoid the hearing because the tanks were still in the ground.

The tanks have been removed. Lieutenant Zahorodnij was there for one phase of the removal but an individual named Terry Chambers on staff with the Fire Department was there for most of the removal. The reason the extension was given to the Cadle Company was because it indicated that the premises did not generate sufficient funds for corrective action and the Fire Department tries to work with the business community to do the right thing. The Cadle Company did not have insurance coverage at the time they went to the Board.

Testimony of Victor O. Buente, Jr.

Mr. Buente testified on behalf of the employer, the Cadle Company, as follows:

Mr. Buente is Vice-President, Assistant Secretary and General Counsel of the Cadle Company. He is an attorney by profession. GAMED is an affiliate of the Cadle Company. Mr. Buente is also an officer for GAMED. He is Vice-President and Assistant Secretary. As such he is the custodian of the records. He also comes into receipt of reports concerning the environmental condition of property GAMED owns. This would include the Jennings Road property. Exhibit 20 was received by the Cadle Company as an affiliate of GAMED and it concerns the Jennings Road property. It is a preliminary site assessment and was prepared by the Cardamone Construction Company. Cardamone

was retained by GAMED to remove the storage tanks at the Jennings Road location. Exhibit 21 is entitled, "Review of Underground Storage Tanks Closure" for the old St. Johnsbury Trucking Terminal, 4041 Jennings Road, Cleveland, Ohio. The client is GAMED Investment Company. The final closure report shows that there were no holes in the tank and there was no leakage.

Mr. Buente was with the Cadle Company for three years. Mr. Buente and the Cadle Company did not consider the tanks to be abandoned just because they were not in use. Based upon Mr. Buente's view of the materials within the REO file for the Jennings Road property and discussions with the inspector who conducted the survey, Mr. Buente did not believe there to be any environmental hazards present at the Jennings Road property.

Mr. Buente interviewed Mr. Masek when Masek was hired and felt that Masek's background as a lawyer would be an asset to the company. However, Mr. Masek expressed concern about being responsible for any environmental decisions regarding contaminated or environmentally impacted properties. Mr. Masek felt that one or more government agencies could look to him for possible criminal or civil liability.

Mr. Buente was present at several meetings between Mr. Masek and Mr. Cadle about removal of the tanks and Cadle was not concerned about studies for various issues. He simply wanted the tanks pulled out of the ground and he was concerned about the price. It was Mr. Masek's responsibility to get the tanks out of the ground. That was Mr. Cadle's direction. Beside Mr. Masek's testimony, Mr. Buente never heard of discussions within the Cadle Company about an environmental hazard at Jennings Road.

The Cadle Company's policy concerning credit reporting facilities is as follows: it is suppose to be used only for obtaining credit reports on people or companies who are indebted to the Company or one of its affiliates. Mr. Masek was not indebted to the Cadle Company and neither was his former wife.

Mr. Buente did not have involvement with the decision to terminate Mr. Masek. As far as responding to requests from outside parties for information on the Cadle Company of properties, he told Mr. Masek that these requests should be satisfied and if Cadle disagreed that there should be a cover letter explaining areas of difference. If the Fire Department requested a site assessment on the Jennings Road property and there was one on file, then Masek would have been expected to send it to him.

With regard to the citation against Mr. Cadle, there was a trial and a judge sitting without a jury found him guilty for failure to remove underground storage tanks. (TR 153) He was found guilty on August 10, 1994, and his extension was good until

March 31, 1994. Mr. Buente testified that he did not know whether Mr. Cadle was cited for non-removal of the tanks because of various contacts made by Mr. Masek. (TR 156) Mr. Buente was not aware that Mr. Masek contacted the U. S. Attorney's Office and that the investigator of the Fire Department until he was prepared for trial.

Testimony of Denise Harkless

Denise Harkless is employed by the Cadle Company as an Account Officer and a Team Leader. The Account Officers make contact with the debtors and try to collect on the debt. They look at the financial ability of the maker/guarantors and then try to determine the collectibility of the account. As a Team Leader, she oversees what other Account Officers are doing. She is there to help them. (TR 179) Denise Harkless was Team Leader in January of 1994 when Mr. Masek started working at the Cadle Company and he was assigned to her team. She trained Mr. Masek. When he was initially hired he sat in front of her desk and she was able to monitor him. He was given a small portfolio and he was hired as a collector. Dan Cadle decided that he wanted to create a REO Manager, that is he wanted all of the real estate owned properties to be handled by one individual as oppose to individual account officers. That job was given to Mr. Masek. He also had collection responsibilities. Harkless reviewed Exhibit 5 and said that she recognized the exhibit as Mr. Masek's accounts. The accounts were not worked. (TR 182)

Miss Harkless trained Mr. Masek on the use of the credit computer and explained to him the restrictions on its use. (TR 184) On one occasion, Mr. Masek settled a debt with a doctor through the doctor's CPA and Miss Harkless felt that it was not a good settlement because the physician was a neurosurgeon and she felt he had the income ability to pay the debt in full.

When Mr. Masek first arrived, he did not have a lot of work to do so his work performance was not bad. When he was given the assignment of the REO he eventually told Miss Harkless that the REO job was a full-time job. After he got the REO position, he ignored the normal collection on the accounts other than evening calls and his performance was unsatisfactory. The preparation of leases for property that was owned by the Cadle Company was Masek's responsibility. There came a time when he refused to prepare leases. (TR 188)

Miss Harkless identified page one of Exhibit 2 as a memorandum she wrote to Bill Shaulis. She wrote the memo because Mr. Masek told her that he did not get paid enough money to draw up leases. The next two pages of Exhibit 2 were written because Mr. Masek felt that if he made any decisions on EPA properties he might be held personally liable. They would try to pinpoint his exact duties. (TR 191)

There came a time when Mr. Masek returned the Jennings Road REO to Miss Harkless. He said, "Denise, I can't go any further with this file and I'm turning it over to you." This was about April of 1994. She told Mr. Masek the only thing he needed to do was find a contractor that would give them a cap on the work.

Miss Harkless was present when Masek was fired. He was fired for more than one reason but one incident probably was the actual final decision. Bill Shaulis fired Mr. Masek. She and Mr. Shaulis decided to terminate Mr. Masek. He was fired because he was away from his desk and she knew that he was back at the computer imputing information although she did not physically sit there and watch him. A secretary, Brenda Cadle, came out and said that there was a problem, that Mr. Masek had done something to the computer and it was spitting out all these reports. (TR 197) She could only assume that he hit the wrong button because the machine starting pulling everything that was in storage and spitting it out. They noticed that Mr. Masek's credit bureau had been pulled and there was no reason for that. (TR 198) When Masek was confronted that his own credit report was pulled he acted appalled that anyone would pull his credit and acted like he had no knowledge and that he did not do it. Bill Shaulis ended up going to speak with Dan Cadle and later Shaulis called her in and Shaulis told her that he was going to terminate Ray Masek. (TR 201) Up until the time of the computer incident, Miss Harkless gave feed-back to her superior that Masek wasn't performing. However, after the computer incident, she related that to her office manager immediately. They discussed that Masek be terminated. (TR 204) She thought Masek should be terminated and conveyed that to Mr. Shaulis. She had no knowledge prior to her recommendation that Masek reported to the U.S. Attorney and to an Environmental Investigator that there was a problem with leaking tanks. (TR 206, 207)

Testimony of William E. Shaulis

Mr. Shaulis testified on behalf of the Employer as follows:

Mr. Shaulis is employed by the Cadle Company as Vice-President and Office Manager. He does the hiring and the firing. He manages the day-to-day duties of the office. Mr. Shaulis received Mr. Masek's resume from Cencor. He interviewed Mr. Masek prior to hiring him. Masek told Shaulis that Copperweld went bankrupt so he lost his job. (TR 252) With regards to his position at Reliance, Masek said that the company was sold via leveraged buy-out and his position was eliminated. Masek did not tell Shaulis that he filed two separate law suits against Reliance. Had Masek told Shaulis the truth about his termination from prior employment, that is, suing other employers, Shaulis would not have hired him.

Denise Harkless expressed dissatisfaction concerning Masek's job performance several times. The problem with Masek's performance was mainly procrastination. This was discussed with Mr. Masek. Shaulis also recalls a conversation with Masek concerning his refusal to prepare leases. This was in March of 1994. Masek did not want to do it because he was only getting paid \$10.00 per hour. Shaulis also discussed with Mr. Masek his failure to accurately keep track of his time. Shaulis met with Masek regarding his time and this was a formal meeting.

Also, Shaulis had to pressure Masek in contacting Cardamone Construction Company regarding removal of the tanks. (TR 259) Shaulis was not aware that Masek sent a copy of a memo to the Cleveland Fire Department.

Also, Shaulis discussed with Masek how he conducted himself over the telephone regarding his collection duties.

Shaulis received complaints from co-workers in every single department including his direct co-workers on his collection team. These complaints were about Masek's performance.

Also, Shaulis confronted Masek regarding credit reports that were pulled on his ex-wife and himself. (TR 261) Shaulis believes that it was the next day that Masek was terminated. He discussed the termination with Denise Harkless, in fact, he and Harkless discussed Masek's termination for awhile but it was the credit report incident that was the "nail in the coffin". (TR 262) Shaulis met with Masek and informed him that his employment was being terminated and he started to explain the reason and Masek just said thank you, got up, went to his desk, and cleaned it out. (TR 262) Shaulis had no knowledge that Masek had provided any information to the Cleveland Fire Department at the time that Masek was fired. Shaulis had no knowledge that Dan Cadle had been found guilty for failing to remove tanks.

Shaulis terminated Masek on August 26, 1994. As of that day, he was not aware that Masek had been in touch with the U.S. Attorney's Office and other individuals outside of the Cadle Company regarding alleged leaky tanks. (TR 274, 275) He learned of this information just before trial. Shaulis had no knowledge that Masek contacted any outside people regarding the Jennings Road property tanks other than for removal purposes. He was not aware that he complained to any authority regarding these tanks.
Testimony of Victor O. Buente, Jr. in Rebuttal

Mr. Buente said he remembered a two-page letter from Vadose Research which was presented at Mr. Cadle's hearing of August 10, 1994. Buente saw and read the memo. (CX 6) It is a two-page letter from Vadose Research directed to Mr. Masek concerning the property at 4041 Jennings Road and it was a cross-proposal for monitoring gas and organic compounds prior to removing the

underground storage tanks. As of August 10, 1994, Mr. Buente was aware that Masek gave this memo to the Fire Inspector or the Prosecutor. However, Buente was not directly or indirectly responsible for terminating Masek. Mr. Cadle was aware that Masek transmitted the memo to the Cleveland Fire Department as of August 10, 1994, because when the memo was brought out in Court, it had a cover sheet which had Masek's name on it. Buente asked to see it and Dan Cadle was standing right next to him and they both looked at it. So both Buente and Cadle knew that Masek was responsible for providing the information to the Fire Inspector. (TR 284) However, Buente had no knowledge that Masek contacted U.S. officials until he was preparing for trial. (TR 287) Buente could not recall whether he discussed anything that transpired at the hearing with Mr. Shaulis. (TR 290) Buente saw CX 3 at Cadle's August 10, 1994 hearing.

Testimony of William Shaulis Recalled by the Court

Shaulis testified that before he terminated Masek, he had not seen CX 3. He was not aware of it in any way. Mr. Cadle did not tell him to terminate Masek. (TR 305) Cadle never directed him to terminate Masek, he did it upon his own initiative. (TR 306)

Testimony of David Rodenhausen in Rebuttal

David Rodenhausen testified by way of deposition on November 9, 1995. Rodenhausen resides at 89089 East Pilgrim, Chagrin Falls, Ohio. Mr. Rodenhausen has been an investigator for the Department of Labor since 1976.

In November 1994, Rodenhausen investigated a complaint brought by Ray Masek against the Cadle Company. In the course of his investigation, he interviewed Dan Cadle and William Shaulis. Based upon Rodenhausen's interview of Mr. Shaulis, Shaulis did not terminate Masek solely on his own initiative. Rodenhausen did not know whether Mr. Cadle told Shaulis to terminate Masek. It is Rodenhausen's understanding that Dan Cadle was also involved in terminating Masek. Shaulis told Rodenhausen that he was allowed to terminate Masek. Mr. Cadle gave Shaulis the authorization to terminate Masek. This occurred a couple of days before the termination, four days before, according to memory. Shaulis told Rodenhausen that he had conversations with Mr. Cadle regarding the termination of Mr. Masek. Based upon Rodenhausen's investigation, Cadle was totally involved in the operations of the Company. Cadle controlled everything.

Claimant's Exhibits

Among the Claimant's exhibits are the following:

A letter from William Ullom, President of Vadose Research, Inc. dated June 15, 1994. The purpose of this letter was to provide a cross-proposal to perform combustible gas monitoring and concurrent volatile organic compound monitoring of the soil atmosphere prior to the removal of underground storage tanks from the property located at 4041 Jennings Road, Cleveland, Ohio. It indicates that prior investigations concluded that the soils to be excavated contains combustible soil atmospheres. The condition presented a potential work place hazard to excavation personnel as well as employees of St. Johnsbury Trucking Company and passers-by. (CX 3)

CX 3, page 4, shows that this proposal was sent to Inspector Zahorodnij with the City of Cleveland Fire Department. CX 3, page 5, is a memorandum dated June 21, 1994, to Denise Harkless from Mr. Masek. Masek states that Cadle refused to sign the consulting agreement with Vadose Research. Masek urged the tank removal as ordered by the Cleveland Fire Department.

On April 7, 1994, Denise Harkless wrote to Dan Cadle concerning the property at 4041 Jennings Road. She indicated that Masek felt he had gone as far as he could go with the file and requested that she handle the matter. The Company was out of time for further extensions, she spoke to the Fire Marshall on April 5, 1994, and he wanted a specific date by the end of the week when work would commence to remove the tanks. Harkless urged Cadle to hire a contractor immediately and to come up with a specific policy in handling EPA problem properties. (CX 7)

There is a letter to Daniel Cadle from Vadose Research, Inc. dated November 14, 1991. The letter states that it was Vadose's understanding that there were five underground storage tanks currently abandoned at 4041 Jennings Road. (CX 6) These tanks had been inoperative/abandoned since prior to January 3, 1991. A combustible gas explosion hazard existed as determined during the soil gas survey. The gas was largely composed of Methane. Also oil seepage was observed at the north end of the property. Water exhibiting a petroleum hydrocarbon sheen was observed exiting the storm sewer and entering the Cuyahoga River.

Attorney Victor Buente wrote to Captain Thomas Root with the Fire Prevention Bureau, Cleveland Fire Department, on January 11, 1993. Mr. Buente indicated that the tanks were not abandoned, they were simply not in use. He also indicated that the tanks were empty. (CX 6)

Employer's Exhibits

Exhibit 2 is a memo dated 3/15. It indicates that Masek felt that at ten dollars an hour he did not want to prepare leases. He was hired as a collector and not as an attorney.

Exhibit 6 are handwritten summaries of unauthorized credit inquiries discovered by Denise Harkless and among the names listed are Raymond Masek and Lynn Masek.

Exhibit 7 is a memo from Bill Shaulis to the Ray Masek Personnel File dated August 26, 1994. It indicates that on said date he met with Ray Masek and Denise Harkless in his office and at the meeting, he informed Masek that he was being terminated effective immediately. Masek thanked them for the opportunity of working there, cleaned out his desk and departed.

Exhibit 8 contains letters from William Shaulis to various credit agencies advising them of unauthorized credit inquiries. It indicates that the Cadle Company did not have direct proof but it believed that a former employee, Ray Masek, made the inquiries.

Exhibit 9 are various pleadings involving Mr. Masek against the Reliance Electric Company; a law suit involving Mr. Masek against a former employer prior to his employment with the Cadle Company.

Exhibit 10 is another pleading involving Mr. Masek against the Reliance Electric Company; a law suit involving Masek against a former employer prior to his employment with the Cadle Company.

Exhibit 11 is a pleading involving Mr. Masek against the Copperweld Steel Company. This is another case Mr. Masek had against a former employer prior to his employment with the Cadle Company.

Exhibit 15 shows that on April 11, 1994, Dan Cadle wrote first to the City Fire Marshall about the Jennings Road property informing him that they were near signing a contract for the removal of the five underground storage tanks. He also wrote to Joe Hirsch concerning removal of the tanks. A third letter on April 11, 1994, was to Vincent Marek about removal of the tanks.

Exhibit 18 shows that Ray Masek sent to Inspector Zahorodnij a copy of a memo from Ray Masek to Denise Harkless dated June 21, 1994. The memo states that Daniel Cadle refused to sign a consulting agreement with Vadose Research. Cadle acknowledged on June 16, 1994, that one of the tanks was leaking. Vadose believed that the presence of the tanks and their combustibility

presented a substantial safety hazard to the public. Vadose believed that Cadle was in violation of state and Federal law. Masek urged the tank removal as ordered by the Cleveland Fire Department.

Exhibit 19 shows a bid proposal of \$18,125.00 from Cardamone Construction to remove the five tanks on the Jennings Road property. The date of the bid was July 27, 1994.

In comparing Respondent's Exhibit 17 and Respondent's Exhibit 13, among the documents at 17 is a cost proposal submitted by Vadose Research, Inc. (VRI) dated November 14, 1991. VRI described the five tanks as abandoned. It also indicates that the tanks had been inoperative/abandoned since prior to January 3, 1991, and that a combustible gas explosion hazard existed which was attributed to the buried organic matter and that oil seepage was observed at the north end of the property adjoining storm sewer outlet into the Cuyahoga River. Respondent's Exhibit 13 is a letter from Victor Buente, General Counsel of the Cadle Company, dated January 11, 1993, written over a year after the tanks were described as, "inoperative/abandoned". Buente reported to Captain Thomas Root with the Fire Prevention Bureau in Cleveland that the tanks were not abandoned, they were simply not in use by the current tenant. He also indicates that the tanks were empty and did not present a leakage risk to the area. I note again the date of this letter is January 11, 1993, over one year after the Vadose Research letter which was dated November 14, 1991. Employer's Exhibit 17 also contains a letter from William Ullom, President of Vadose Research, to Dan Cadle, President of GAMED Investment Company and the Cadle Company, urging him to fulfill his obligations under the law regarding the Jennings Road property. This letter is dated November 25, 1992, which was also before the Buente letter of January 11, 1993.

Employer's Exhibit 19 shows that as of August 2, 1994, the tanks were still not removed from the Jennings Road property. This was reported by Fire Inspector Zahorodnij.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings and conclusions which follow are based upon a review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

Whenever I reference the evidence as summarized above, or the transcript, I am predicating my finding and/or conclusion on said evidence. Therefore, I hold the referenced testimony and/or exhibit to be true and accurate and a finding of fact herein. If there is a conflict in the evidence, I will present all sides, resolve the conflict, and state by rationale.

1. 29 C.F.R. §24.2 provides, in pertinent part, as follows:

(a) The several statutory employee protection provisions listed in §24.1, provide that no employer subject to the provisions of the Federal statute of which these protective provisions are a part may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in paragraph (b) of this section.

(b) Any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee who has:

(1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced a proceeding under one of the Federal statutes listed in §24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;

(2) Testified or is about to testify in any such proceeding; or

(3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of such Federal statute.

2. Complainant filed a Complaint against the Cadle Company on September 21, 1994, alleging wrongful discharge invoking the protection provisions under various statutes listed at 29 C.F.R. §24.1. I find that Complainant was employed by the Cadle Company from on or about May 1, 1994, and was terminated on August 26, 1994. (See stipulation at TR 6, 7) I find further that the parties are subject to the jurisdiction of the Secretary of Labor and the various statutes mentioned in Complainant's Complaint.

3. Under the burdens of proof and production in "whistleblower" proceedings, a complainant first must make a *prima facie* showing that protected activity motivated the respondent's decision to take adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory

reason. The complainant then must establish that the reason proffered by the respondent is not the true reason. Complainant may persuade directly by showing that the unlawful reason more likely motivated the respondent or indirectly by showing that the respondent's proffered explanation is unworthy of credence. *Scerbo v. Consolidated Edison Co. of New York, Inc.*, Case No. 89-CAA-2, Sec. Dec., November 13, 1992; *Dartey v. Zack Co.*, Case No. 80-ERA-2, Sec. Dec., April 25, 1983.

4. In order to establish a *prima facie* case, Masek must show that he engaged in protected activity, that he was subject to adverse action, and that Respondent was aware of the protected activity when it took the adverse action. Masek also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Whether Masek Established a *Prima Facie* Case

5. I find that Raymond Masek has established a *prima facie* case for these reasons. According to Masek's uncontradicted testimony, Masek sent the Vadose Research report to Inspector Ollie Zahorodnij with the Cleveland Fire Prevention Bureau by fax. (see Exhibit C-4; TR 35, 36) This occurred on June 21, 1994. Complaints to, and cooperation with, local authorities are protected under Department of Labor Whistleblower provisions. *Ivory v. Evans Cooperage, Inc.*, 88-WPC-2, Sec. Dec., February 22, 1994, slip. op. at 2, 5; *Helmstetter v. Pacific Gas and Electric Company*, 91-TSC-1, Sec. Dec., January 13, 1993. Dan Cadle was aware that Masek was responsible for providing the report to the Fire Inspector. On August 22, 1994, four days before Masek was terminated, Cadle called Masek. Cadle inquired as to who sent the Fire Marshall Vadose's report and Masek told him that he did. (TR 32, 44) ² Cadle then threatened to fire Masek. On or about August 10, 1994, Dan Cadle was found guilty for failure to remove the underground storage tanks (on the Jennings Road property) by a judge sitting without a jury. (TR 153) Mr. Buente testified that he remembered a two-page letter from Vadose Research was presented at Mr. Cadle's hearing on August 10, 1994. Buente saw and read the memo and was aware as of that date that Masek provided the memo to the Fire Inspector or to the Prosecutor. Mr. Cadle was also aware that Masek transmitted the memo to the Cleveland Fire Department as of August 10, 1994, because when the memo was presented in court, it had a cover sheet which had Masek's name. Buente asked to see it and Dan Cadle was standing right next to him and they both looked at it. I find that both Buente and Cadle knew as early as August 10, 1994, that Masek was responsible for providing the information to the Fire Inspector. (TR 284) Denise Harkless and William Shaulis terminated Mr. Masek on August 26, 1994.

² Masek's testimony regarding this telephone call and its subject matter remains uncontradicted.

6. I find Masek reported violations of environmental statutes internally to his employer which is protected activity under whistleblower provisions. *Guttman v. Passaic Valley Sewerage Comm'rs*, 85 WPC-2, Sec. Dec., March 13, 1992, slip op. at 11; *Wagner v. Technical Products, Inc.*, 87-TSC-4, Sec. Dec., November 20, 1990, slip op. at 8-12; *Willy v. The Coastal Corp.*, 85-CAA-1, Sec. Dec., June 4, 1987, slip op. at 3. I base my finding that Masek reported problems with the buried tanks and his frustrations at the reaction from Mr. Cadle upon Masek's uncontradicted testimony. Respondent argues that Masek's claim should be dismissed because he failed to establish a federally-protected activity. As I stated earlier, complaints to and cooperation with local authorities are protected. Furthermore, under the employee protection provisions of the CAA, protection is not dependent on actually proving a violation. *Scerbo v. Consolidated Edison Co. of New York, Inc.*, *supra*. A complaint need only be grounded in conditions constituting a reasonably perceived violation of the underlying act. See *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992); *Johnson v. Old Dominion Security*, 86-CAA-3, Sec. Dec., May 29, 1991, slip op. at 15; *Aurich v. Consolidated Edison Co.*, 86-ERA-2, Sec. Dec., April 23, 1987, slip op. at 4; *Adams v. Coastal Production Operators, Inc.*, 89-ERA-3, Sec. Dec., August 5, 1992.

Wherefore, I find that Masek engaged in protected activity by assisting the Fire Marshall in the proceeding against Cadle, by sending the Vadose Research report to Inspector Ollie Zahorodnij and by complaining internally to his employer. He was subject to adverse action by being terminated on August 26, 1994, and there is ample evidence showing that the respondent was aware of the protected activity when adverse action was taken against Masek. Cadle's phone call to Masek on August 22, 1994, his threat to fire Masek, and the close proximity of the call to Masek's termination raises the inference that the protected activity was the likely reason for the adverse action.

Respondent's Rebuttal Evidence

7. The Respondent has presented rebuttal evidence. Miss Harkless testified that she instructed Mr. Masek on the use of the credit computer and explained to him the restrictions on its use. (TR 184) Mr. Masek pulled his own credit report which she reported to her office manager. William Shaulis testified that Masek's problem was mainly procrastination, however, the credit report incident was the, "nail in the coffin". (TR 262) While he and Denise Harkless discussed Masek's termination for awhile, it was the credit report incident which lead to Masek's termination. Mr. Shaulis testified that as of August 26, 1994, he was not aware that Masek had been in touch with the U.S. Attorney's

Office ³ and other individuals outside of the Cadle Company regarding the leaking tanks (on Jennings Road). (TR 274, 275) Shaulis was not aware that Masek complained to any authority regarding the tanks. Before Masek was terminated, Mr. Cadle did not tell him to terminate Masek. (TR 305) Mr. Cadle never directed Shaulis to terminate Masek. He did it upon his own initiative. (TR 306)

Whether Respondent's Reason for Masek's Termination was the True Reason

8. I find that Respondent's explanation for Masek's termination to be a pretext and untrue. I base my finding on the testimony of Investigator David Rodenhausen. I give greater weight to Rodenhausen's testimony than to the testimony of William Shaulis and Denise Harkless. Rodenhausen has no interest in the outcome of this litigation, whereas, Harkless and Shaulis work for Dan Cadle and the Cadle Company and obviously do have an interest in the litigation.

In the course of Rodenhausen's investigation, Rodenhausen interviewed Dan Cadle and William Shaulis. Shaulis told Rodenhausen that he did not terminate Masek solely on his own initiative, therefore, I find that Shaulis' testimony in court untrue. Shaulis told Rodenhausen that he was "allowed" to terminate Masek. Mr. Cadle gave Shaulis the authorization to terminate Masek. I find that Shaulis' statement to Rodenhausen to be inconsistent with his testimony in court that Cadle did not tell Shaulis to terminate Masek, that he did it upon his own initiative, and that Shaulis does the hiring and the firing. Mr. Shaulis told me in court (TR 306) that it was his job to fire Mr. Masek. I asked Mr. Shaulis whether he terminated Mr. Masek on his own initiative and Mr. Shaulis responded, "that's my job". I find Mr. Shaulis' testimony on this point to be impeached by Investigator Rodenhausen and not worthy of belief.

³ Masek's complaint alleges that he was wrongfully discharged for bringing "documented matters" to the attention of federal authorities. There is no evidence that anyone associated with the Cadle Company knew that Masek contacted "federal authorities" prior to his discharge. There is ample evidence that Victor Buente and Daniel Cadle knew of Masek's contact with the Cleveland Fire Department which I find to be covered under 29 C.F.R. §24.2(b)(3). Since no particular form of complaint is required (20 C.F.R. §24.3(c)), and I can see no prejudice to the Respondent due to Masek's failure to mention the Cleveland Fire Department in his Complaint, I find this oversight to be harmless.

CONCLUSION

The above considered, on the issue of liability only, I find for the Complainant, Raymond Masek, and against the Respondent, The Cadle Company.

ORDER

1. The damage portion of this case involving Complainant and Respondent will commence within 120 days at a time and place to be announced. The parties will consult on the location of the trial and advise whether they will agree to trial taking place in Pittsburgh, Pennsylvania.

2. Any and all outstanding motions will be renewed within 30 days and the parties will be prepared to argue and document said motions at trial.

3. Consideration will be given to whether a settlement on damages is possible and, if not, whether the testimony and/or other evidence on damages can be taken by deposition and/or affidavit.

MICHAEL P. LESNIAK
Administrative Law Judge

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